

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LYNN BARTLETT)	
Claimant)	
VS.)	
)	
COLLETTI & SONS TRUCKING)	Docket No. 195,049
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the Award entered May 17, 1996, by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral arguments on October 22, 1996.

APPEARANCES

Claimant appeared by his attorney, Gary W. Kendell of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James M. McVay of Great Bend, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. The Award incorrectly showed, as paragraph 3, that there was a stipulation that claimant's accident arose out of and in the course of his employment. However, this was also correctly listed as an issue in the Award.

ISSUES

The Administrative Law Judge found that claimant's August 12, 1994, accident arose out of and in the course of his employment but denied claimant's request for benefits, finding claimant failed to provide timely notice of accident. Claimant appealed that notice finding together with the Administrative Law Judge's findings concerning the nature and extent of

claimant's disability and the amount of temporary total disability compensation to which claimant may be entitled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds that the Award of the Administrative Law Judge should be reversed in part and modified in part to reflect a compensable injury but without permanent disability.

The Administrative Law Judge found claimant met with personal injury by accident on August 12, 1994, and that said accident arose out of and in the course of claimant's employment with respondent. However, the Administrative Law Judge denied the claim based upon a finding that claimant had failed to sustain his burden of proving that he gave his employer timely notice of said accident. In so finding, the Administrative Law Judge accepted the testimony of the owners of the respondent trucking business over that of the claimant, noting "The court does not find the claimant's version of notice credible in the face of overwhelming testimony to the contrary and the lack of credible supporting evidence."

The Appeals Board finds persuasive support for claimant's testimony that he gave timely notice to his employer in the medical records of Dr. John Littleford and in Claimant's Exhibit 2 to the transcript of the November 22, 1994, preliminary hearing proceedings. Dr. Littleford's office notes of August 13, 1994, make reference to claimant's symptoms having begun the day before while chasing cattle at work. In addition, there is Claimant's Exhibit 2 which is a narrative report given by claimant to the police on August 23, 1994, concerning the loss of certain personal property from his truck. That narrative report refers to an August 21, 1994, telephone conversation between claimant and Joe Colletti, one of the co-owners of respondent company. According to that report, the conversation included a discussion of claimant's back injury, the fact that it was work related, and that he (claimant) would be filing a claim for workers compensation benefits. That preliminary hearing was not heard by the same administrative law judge who decided this case.

The only testimony presented in person before the Administrative Law Judge who entered the Award was the testimony of claimant at the March 13, 1996, regular hearing. With the exception of the two preliminary hearings, which were conducted before a different Administrative Law Judge, all other evidence was taken by deposition. Accordingly, the Administrative Law Judge who decided this case did not witness the testimony which contradicted claimant's and thus was not in a much better position to judge the credibility of the witnesses than is the Appeals Board.

K.S.A. 44-520 provides in pertinent part:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident"

The Appeals Board finds that claimant did provide the required notice at least by August 21, 1994, which was within 10 days of his August 12, 1994, accident. Therefore, the findings and conclusions of the Administrative Law Judge with regard to notice are reversed.

The Appeals Board agrees with the findings and conclusions of the Administrative Law Judge with regard to the nature and extent of claimant's injury, specifically, that claimant suffered only a temporary aggravation of his prior back injury. Accordingly, claimant is not entitled to an award for permanent partial general disability compensation. Claimant would, however, be entitled to temporary total disability except that the evidence does not establish the period for which such compensation is due. Claimant has failed to meet his burden of proof in this regard.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated May 17, 1996, should be, and is hereby, reversed as to the findings concerning notice and compensability, and is hereby modified to award the temporary total disability compensation paid to date and the cost of all reasonable and related medical treatment for claimant's August 12, 1994, injury. The Award is, otherwise, affirmed and the orders of the Administrative Law Judge concerning claimant's contract of employment with his counsel and the assessment of costs and fees are hereby approved and adopted by the Appeals Board as its own as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary W. Kendell, Wichita, KS
James M. McVay, Great Bend, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director